

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Order of Conditional
License and Order to Forfeit a Fine
against the License of Kimberly Oscarson

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on December 3, 2009, in Conference Room 31A of Crow Wing County Social Services, 204 Laurel St, Brainerd, Minnesota. Janine L. LePage, Assistant Crow Wing County Attorney, appeared on behalf of Crow Wing County Social Services (the County) and the Minnesota Department of Human Services (the Department). The Licensee, Kimberly Oscarson, appeared on her own behalf.

The hearing record closed at the conclusion of the hearing on December 3, 2009.

STATEMENT OF ISSUES

1. Did the Licensee and her mother transport day care children under nine years of age before they had completed the child passenger restraint training required under Minn. Stat. § 245A.50, subd. 6? If so, should a fine of \$200 imposed on the Licensee for this noncompliance?

The Administrative Law Judge finds that they did transport day care children before completing the required training, concludes that the Licensee violated the child passenger restraint training requirement, and recommends that imposition of the \$200 fine be affirmed.

2. Did the Licensee allow her mother to provide care to infants prior to completing the Sudden Infant Death Syndrome and Shaken Baby Syndrome training required under Minn. Stat. § 245A.50, subd. 5? If so, should a fine of \$200 be imposed on the Licensee for this noncompliance?

The Administrative Law Judge finds that the substitute did not provide care to any infant prior to completing the Sudden Infant Death Syndrome and Shaken Baby Syndrome training requirement, concludes that there was no such violation, and recommends that imposition of this fine be reversed.

3. Did the Licensee's mother provide 30 or more hours of day care in a 12 month period prior to March 1, 2009, so as to be required to obtain the training required under Minn. Stat. § 245A.50? If so, should the Licensee's family child care license be made conditional for allowing her mother to provide care before completing that and the other required training?

The Administrative Law Judge finds that the Licensee's mother did not provide 30 or more hours of care in any relevant 12-month period, concludes that her License should not be made conditional, and recommends that the order of conditional license be reversed.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee has provided family child care in her Brainerd home since obtaining a license in March 2002.¹ She lives there with her husband and two daughters, who were 5 and 7 years of age in 2009.

2. The Licensee's mother, Judy Monasmith, lives in Brainerd, about a half mile from the Licensee's home. She occasionally substitutes for the Licensee and has submitted annual background study requests. The Licensee's father, Thomas Monasmith, lives in Nisswa, which is about 15 miles away. He had a background study performed in 2002, but none since. He regularly visits the Licensee and his grandchildren, but is not a caregiver to the day care children.²

3. Diane Anderson is the Child Care Licensor assigned to the Licensee.³

4. Since 2002, the County received one complaint about the sanitation and cleanliness of the Licensee's home. On or after October 21, 2008, Anderson or a Case Aide employed by the County made an unannounced visit to the Licensee's home. The home was clean; no violations were found that day.⁴

5. In 2008, the first time that the Licensee's mother provided substitute care was in May, when the Licensee went to "Kinderfriend Day" for her oldest daughter. The Licensee's mother provided substitute care for approximately two hours that day.⁵

6. On June 5, 2008, the Licensee took the household pet to be vaccinated. The Licensee's mother provided care for approximately one and one-half hours that day.⁶

7. During the 2008-09 school year, the Licensee's daughters were in kindergarten and first grade at Lowell Elementary School. Lowell is eight blocks from the Licensee's home, a little over a half mile. Some of the blocks do not have sidewalks, and children or adults walking to school would have to walk much of the way in the street, particularly in the winter. Apparently, school bus transportation was not

¹ Exhibit 2 at 4.

² Exhibit 7 at 2; Testimony of the Licensee, Judy Monasmith, and Thomas Monasmith.

³ Testimony of Diane Anderson.

⁴ Exhibit 2 at 4; Exhibit 11 at 1; Testimony of Anderson. According to Exhibit 11, the date of the visit was 1/21/08, but the rest of the case note for that date lists events as late as 10/21/08.

⁵ Exhibit 15; Testimony of the Licensee.

⁶ Exhibit 15; Testimony of the Licensee.

available. Therefore, it was necessary for safety reasons that someone drive the girls to and from school.⁷

8. Before December 2008, the Licensee had a friend pick up her daughters after school each day and bring them home. On two or three days a week, the friend also transported a child who attended the Licensee's day care. At some point, the Licensee noticed that there were too many children in the friend's car and that not all of them were wearing seat belts. Because she was concerned for the children's safety, she stopped the arrangement with her friend.⁸

9. Minn. Stat. § 245A.50, subd. 6(b)(1), states that before a license holder, staff person, caregiver, or helper transports a child or children under age nine in a motor vehicle, the person placing the child or children in a passenger restraint must satisfactorily complete training on the proper use and installation of child restraint systems in motor vehicles and the training must be provided by individuals who are certified and approved by the Department of Public Safety. A "caregiver" is "the provider, substitute, helper, or another adult giving care in the residence."⁹

10. A "helper" is a person 13 through 17 years of age who assists the provider with the care of children.¹⁰ A "substitute" is an adult caregiver who assumes the responsibility of the provider. The use of a substitute caregiver is limited to a cumulative total of not more than 30 days in any 12-month period.¹¹ All adult caregivers who provide more than 30 days of care in any 12-month period are considered "primary caregivers" who, along with the license holder, must complete additional training each year.¹²

11. The Licensee had never intended to transport day care children to or from her home and had placed that obligation upon their parents. Therefore, she had never taken the child restraint systems training. But in December 2008, she found it necessary to drive her own children and, occasionally, one day care child. The Licensee could not find any restraint training immediately available, and decided that she, with help from her mother, would pick up the children and get the restraint training later. The Licensee did not call Anderson at that time for assistance in finding the training.¹³

12. Beginning December 1, 2008, Licensee or her mother picked up the Licensee's daughters when school let out at 2:45 p.m. and took them back to the Licensee's home. They occasionally also picked up the daughter of Darla Epperson, who was also in kindergarten at Lowell Elementary, and who went to the Licensee's day

⁷ Testimony of the Licensee. According to its website, www.isd181.org/lws, Lowell Elementary School is at 704 3rd Ave NE, which is six blocks north and two blocks east from the Licensee's home according to online maps of Brainerd.

⁸ Exhibit 2 at 2; Testimony of the Licensee.

⁹ Minn. R. 9502.0315, subp. 6.

¹⁰ Minn. R. 9502.0315, subp. 14.

¹¹ Minn. R. 9502.0315, subp. 29; Minn. R. 9502.0365, subp. 5.

¹² Minn. Stat. § 245A.50, subds. 2 and 7.

¹³ Testimony of the Licensee.

care after school two or three days per week, depending upon Epperson's work schedule. On a very few occasions, they also picked up the kindergarten child of Risa Luna. When the Licensee picked the children up from school, her mother would arrive at the home around 2:30 p.m., the Licensee would leave around 2:40 p.m., arrive at school around 2:45 p.m., check the children out from the teachers, and normally be back home around 3:00 p.m. During that 20 minutes or so, the Licensee's mother would provide care to the day care children remaining at the Licensee's home. That was normally two children who were 21 and 23 months old in December 2008.¹⁴

13. Whenever the Licensee had an infant in care, she cared for the infant and had her mother pick up the children from school. The Licensee's mother never provided or assisted in providing care to an infant.¹⁵

14. On January 20, 2009, the Licensee again took the household pet to be vaccinated. The Licensee's mother substituted for her at the day care for the approximately one and one-half hours the Licensee was gone for that purpose, as well as when the Licensee went to pick up the children from school.¹⁶

15. In early 2009, Anderson sent the Licensee a renewal packet for her March renewal. When that was not returned, Anderson sent a reminder. The Licensee called on February 17, 2009, said that she had lost the packet, and requested another.¹⁷

16. On February 23, 2009, the Licensee called Anderson and said that she was looking for child passenger restraint training because she had been transporting her own two children and one day care child home from school two to three days per week beginning in December. Anderson responded that it was against the rules to transport children without the restraint training and that she should stop doing so immediately. Anderson also told her at that time or some other time that the day care rules apply to her own children as well as to her day care children.¹⁸ The Licensee did not inform Anderson that day that her mother had also been transporting the children.

17. The Licensee told Anderson that she would not allow her children to walk to and from school, as Anderson suggested, because they might get killed; so she could not stop transporting them. Anderson took that as meaning that the Licensee would not stop transporting the children herself. Anderson offered no suggestions on how the Licensee could resolve her situation legally.¹⁹

18. As Anderson had directed, the Licensee immediately stopped driving her own two children and the one day care child home from school. On February 23 and 24, 2009, she had her mother drive them.²⁰

¹⁴ Exhibit 15; Testimony of the Licensee and Judy Monasmith.

¹⁵ Testimony of the Licensee and Judy Monasmith.

¹⁶ Exhibit 15; Testimony of the Licensee.

¹⁷ Exhibit 11.

¹⁸ Exhibit 11; Testimony of Anderson; Testimony of the Licensee.

¹⁹ Testimony of the Licensee.

²⁰ Testimony of the Licensee.

19. On February 23, 2009, Anderson sent an email to Molly Kelly of the Department's Division of Licensing describing her conversation with the Licensee. Anderson asked, "Is a correction order enough in this case, as she will not comply to the rule even with the correction order?" Kelly wrote back, "So she is allowing children to be transported in a vehicle without enough seat belts? How many children are being transported each day?" Anderson wrote back clarifying that the Licensee had just began transporting the children when she learned that the parent who had been transporting them and others did not have enough seat belts. Anderson said she'd find out more information and get back to Kelly.²¹

20. Anderson and Kelly then either had a telephone conversation or another email exchange in which Kelly advised Anderson to visit the Licensee's home around the time the children would be returning from school. On February 24, 2009, Anderson did so. The Licensee was home during that visit. During their discussion, the Licensee informed Anderson that she herself was no longer transporting the children, but she was having her mother do so. Anderson told the Licensee that having her mother transport the children also violated the rules because her mother was a substitute caregiver who was also required to first complete the child passenger restraint training.²²

21. The Licensee again followed Anderson's instructions immediately and after February 24, 2009, the Licensee's mother stopped transporting day care children until she completed the restraint training.²³ The Licensee arranged to have her father, who was not a caregiver at the Licensee's day care, pick up just her daughters from school. He was happy to do so.²⁴ The Licensee also allowed her mother to pick up just the Licensee's daughters on at least one occasion after February 24, 2009, namely, March 13, 2009.²⁵

22. Minn. Stat. § 245A.50, subd. 3, requires that, when day care children are present, at least one staff person must be present in the home who has been trained in first aid. Similarly, Minn. Stat. § 245A.50, subd. 4, requires that at least one staff person must be present in the home who has been trained in cardiopulmonary resuscitation (CPR) and in the treatment of obstructed airways. An exemption is provided in both subdivisions if the staff person is a substitute caregiver who provides less than 30 hours of care during any 12-month period.²⁶

23. Under Minn. Stat. § 245A.50, subd. 5(a), license holders must document that staff persons, caregivers, and helpers receive training on reducing the risk of Sudden Infant Death Syndrome (SIDS) and Shaken Baby Syndrome (SBS) before they assist in the care of infants. There is no exemption from this requirement. If a caregiver

²¹ Exhibit 11; Testimony of Anderson.

²² Exhibit 11; Testimony of Anderson.

²³ Exhibit 10 at 1; Exhibit 11 at 1; Testimony of the Licensee and Anderson.

²⁴ Testimony of the Licensee and Thomas Monasmith.

²⁵ Exhibit 8.

²⁶ This exemption is counted by **hours**, which is different from the provisions discussed in Finding No. 10 that limit the use of a substitute caregiver to a cumulative total of not more than 30 **days** in any 12-month period.

assists in the care of an infant, he or she must have previously completed the SIDS and SBS training.

24. Anderson incorrectly understood the Licensee to say that the Licensee was gone for an hour each time she picked up the children from school, and Anderson calculated that the Licensee's mother must have provided more than 30 hours of care during the March 1 to March 1 license period. Anderson also believed that the Licensee's mother had provided care to infants. The Licensee's mother had not had the training required of a substitute caregiver and during the February 24, 2009, visit, Anderson and the Licensee discussed that fact.²⁷ The Licensee attempted to convince Anderson that her mother was exempt from the First Aid and CPR training requirements because she had provided less than 30 hours of care during the licensing year. The Licensee said that when her mother got near to 30 hours, the Licensee would be sure that she obtained the First Aid and CPR classes.²⁸

25. On February 27, 2009, the Licensee's mother took two one-hour online classes in SBS and SIDS from Educarer World of Infants. She received Certificates of Training that date stating that she had successfully completed the courses.²⁹

26. Sometime in late February or early March, the Licensee called Epperson and told her that she and her mother could not pick up Epperson's daughter from school until they had the restraint training. Epperson was concerned because on the days that she worked, she could not get to Brainerd until 5:30. She asked if anyone else could do it and the Licensee said she'd try to find out. The Licensee then called the Department. She was told that anyone not affiliated with her day care could transport without the child restraint training, but that she could not set it up. Within a day or so, the Licensee called Epperson and told her that it had to be someone not affiliated with the day care. Epperson asked if she knew anybody. The Licensee told her that her father might be willing to do it, since he was picking up the Licensee's daughters, but that Epperson would have to ask him.³⁰ A few days later, Epperson saw the Licensee's father at the day care and she asked him if he would pick up her daughter, too. He agreed to do so. Risa Luna also asked the same question, received the same reply from the Licensee, and also contacted the Licensee's father, who agreed to pick up her son from school as well.³¹

27. Early on March 3, 2009, Anderson and Kelly had another exchange of emails. Kelly asked who was transporting the children now and what training they had had. Anderson had had no recent contact and responded that when she had last visited

²⁷ The Licensee argues that as a long-time LPN, her mother had First Aid training. But the Licensee has not provided any documentation of any such training that would meet the requirements of Minn. Stat. § 245A.50, subd. 3.

²⁸ Exhibit 10 at 2; Testimony of the Licensee and Anderson.

²⁹ Exhibit at 4-5; Testimony of the Licensee.

³⁰ There is no provision in Minn. Stat. § 245A.50, subd. 6(b)(1), that would prohibit a provider from making arrangements with someone other than a license holder, staff person, caregiver, or helper to transport day care children. However, it is obviously the better practice to avoid doing so.

³¹ Testimony of the Licensee, Epperson, and Thomas Monasmith.

on February 24, 2009, the Licensee had stopped transporting and had let her mother do it. She also reported that the Licensee's mother had been staying with the preschoolers and younger children, that neither had had the Child Passenger Restraint training yet, and that the Licensee's mother had not had the SIDS/SBS or CPR and First Aid training, but was going to be taking the SIDS/SBS on February 27, 2009. Anderson also reported that she would be meeting with the Licensee that afternoon for her relicensing visit.³²

28. On March 3, 2009, Anderson went to the Licensee's home for the relicensing visit. But the Licensee had already mailed in her checklist. Anderson told her that the visit would have to be rescheduled and that she would check her office for the checklist.³³ Apparently it was there, because Anderson never reported or testified otherwise.

29. Later on March 3, 2009, Anderson sent another email to Kelly saying that "Mom is still transporting the children from school back to child care afternoons two to three days per week since Tuesday, February 24th." By "Mom" she meant the Licensee's mother. The statement was not accurate. Later that day, Kelly emailed Anderson saying that she was confused by the case, couldn't figure out who "Mom" was, and that she wanted a list specifying who was transporting, when, and training completed. Anderson wrote back that the Licensee had transported children from December 2008 to February 24, 2009, when she had told the Licensee she could not do so until she obtained the restraint training.³⁴ That statement was accurate.

30. On March 4, 2009, Kelly emailed Anderson that she and her supervisor had come up with a new plan: Anderson should issue a Correction Order to the Licensee for transporting children without proper training and order that she stop transporting immediately until she receives the training. The email went on as follows:

See what she does with the CO. Complies? Transports anyway? (Since the training doesn't appear to be available locally, maybe she will actually have to travel somewhere else ASAP to receive the training.)

If she complies, great.

If she continues to transport, then send us a recommendation for a negative action ASAP – likely a fine/conditional. Include the other training violations as well.

Even if she does comply with the transporting correction order, I recommend you send us a recommendation for a fine for the training violations.

³² Exhibit 10; Testimony of Anderson.

³³ Exhibit 11 at 1.

³⁴ Exhibit 10 at 1-2.

Make sense?³⁵

Kelly was not aware at the time that neither the Licensee nor her mother were transporting day care children any longer.

31. Anderson prepared a letter to the Department dated March 3, 2009, stating that the County was recommending that the Licensee be issued a fine. The recommendation was based upon the County's determination that the Licensee and her mother had violated Minn. Stat. § 245A.18 by transporting a day care child and her own two children from school on several occasions without having completed the required child passenger restraint training³⁶ and had violated Minn. Stat. § 245A.50 by using her mother as a substitute to care for infants before her mother had received the required SIDS/SBS training, first aid training, and CPR training. The County did not recommend that a conditional license be issued. The County did not provide a copy of the recommendation to the Licensee.³⁷

32. It is unlikely that the recommendation was prepared and sent to the Department on March 3, 2009. Since it is precisely the recommendation that Kelly requested on March 4, and Anderson was following Kelly's directions, it likely was prepared on March 4 or, even more likely, on March 5, 2009, when the recommended Correction Order was issued.

33. On March 5, 2009, Anderson issued the Correction Order to the Licensee. It contained two citations and required both to be corrected on March 5, 2009. The first alleged a violation of Minn. Stat. § 245A.18 in that the Licensee and/or her mother "have been transporting in their vehicles w/o Restraint Training (Child Passenger)." The second alleged a violation of Minn. Stat. § 245A.50 in that the Licensee's mother "has been caring for the children over 30 hrs. in licensing year & has not completed CPR & First Aid."³⁸

34. On March 5, 2009, the Licensee mailed her response to the Correction Order to the County, which received it on March 6, 2009. In response to the first citation, the Licensee stated that she and her mother would not be transporting until she could find a Child Passenger Restraint class for both of them. To the second citation, the Licensee responded that her mother had only watched the children for 18 hours during the last license year, but that her mother would be taking the CPR and First Aid classes. She also noted that her mother had First Aid training as she had been an LPN for 39 years. The Licensee requested reconsideration of the second citation of the Correction Order.³⁹

³⁵ Exhibit 10 at 1.

³⁶ In 2007, this statutory requirement was copied from Minn. Stat. § 245A.18, where it applied to several types of providers, to Minn. Stat. § 245A.50, where it was placed with several training requirements that apply specifically to family child care providers. 2007 Minn. Sess. Laws, ch. 112, § 22.

³⁷ Exhibit 2; Testimony of Anderson.

³⁸ Exhibit 12 at 1.

³⁹ Exhibit 12 at 1.

35. On the evening of March 5, 2009, the Licensee located a Child Passenger Safety Technician Instructor in Brainerd and contacted him about taking his class as soon as possible.⁴⁰

36. There were 12 weeks from Monday, December 1, 2008, through Friday, February 20, 2009. Taking out the Holiday Vacation leaves 10 weeks, or 50 school days at most. The Licensee drove the children home two or three days per week, which is about half the days and would be about 25 times.⁴¹ About half of that time she was transporting only her own daughters and about half the time she also picked up Epperson's child or Luna's child, or both. Thus, during that period, the Licensee likely transported a day care child about 12 times. The numbers would be the same for the Licensee's mother, who picked up the children the other half the time. The numbers may have been slightly less if the children were not in school on a particular day.⁴²

37. The Licensee was gone from home while her mother substituted for her on two days from March 1, 2008, to November 30, 2008, and on approximately 25 days from December 1, 2008, to February 28, 2009, a total of 27 days. On those 27 days, the Licensee's mother was a substitute caregiver for something less than 18 hours.

38. The 18 hours testified to by the Licensee is somewhat conservative. The Licensee's testimony on this issue and others was mostly credible. She calculated the hours based upon her list of the 26 dates she transported children in Exhibit 15. She multiplied by 30 minutes per day and added five hours for the three other times the Licensee had her mother substitute for her since March 1, 2008. As noted above, at least two of the dates are erroneous, but the total number is consistent with the testimony of two or three days per week given by her and her mother and the time estimate is conservatively large compared with the pick up times given by the Licensee and her parents and the very short distance actually involved. Even if the time the Licensee's mother spent picking up day care children is counted as time providing care (about 12 times 15 minutes each or three hours total), she provided about 21 hours of care in the 12 months proceeding March 1, 2009. If the time picking up just her grandchildren was legitimate to count, that would be three more hours. Either way, the total over any 12-month period is substantially less than 30 hours.

39. To reach the 34 hours calculated by Anderson, she would have to assume the trip to school and back took one hour, and she would have to include half of the days during the holiday vacation. The Licensee was antagonistic toward Anderson and not totally forthcoming with her. She may have made some comment to Anderson about a trip now and then taking an hour. But if she did, it should have been obvious to Anderson that that was not usually the case. Anderson's calculations, notes, and testimony were not credible on this issue.

⁴⁰ Exhibit 14.

⁴¹ On Exhibit 15, the Licensee listed 26 days that she believes she picked up the children from school. There are at least two errors in the list: January 10 and 11, 2009, were Saturday and Sunday.

⁴² Exhibit 15; Testimony of the Licensee, Judy Monasmith and Thomas Monasmith.

40. Anderson followed through on Kelly's directions to determine compliance with the correction order by having the Licensee's home watched by Case Aides on several afternoons. On March 6, 9, and 11, 2009, they observed a white-haired male in his 60's drop off at least two children between the ages of 5 and 7 about 3:00 p.m. On one or more of the days, there was a third child.⁴³ On March 13, 2009, one of them observed a white-haired lady drop off two children at 2:55 p.m.⁴⁴ The white-haired people were the Licensee's parents. Two of the children dropped off each time were the Licensee's daughters. The third child dropped off by the Licensee's father was Epperson's daughter.⁴⁵

41. The Case Aides' observations are consistent with the testimony of the Licensee and her parents. They show that the Licensee and her mother had stopped transporting day care children. Because school ends at 2:45, the drop off times observed by the Case Aids demonstrate that it takes 10 to 15 minutes from picking up the children to dropping them at the day care. That is consistent with the testimony of the Licensee and her mother that the round trip usually takes 15 to 20 minutes and always less than 30 minutes.

42. On March 16, 2009, the Department received the Licensee's request for reconsideration of the second citation of the Correction Order. The Licensee again admitted that her mother did not have the required training, but again stated that she had only worked for 18 hours in the last year.⁴⁶

43. On April 3, the Licensee and her mother took the Child Passenger Safety course. They received Certificates of Attendance on April 3, 2009, stating that they had successfully completed the course that day.⁴⁷

44. By letter of July 1, 2009, the Department affirmed the Correction Order. The Department's Order states that the county calculated that the substitute (her mother) cared for the children more than 30 hours in the previous year. It also states that, "when the licenser previously discussed this issue with you, you did not disagree." Based upon that, the Department found that the greater weight of the evidence showed that her substitute most likely did provide care for more than 30 hours in a 12-month period.

45. On September 22, 2009, the Department issued a combined Order to Forfeit a Fine, Order of Conditional License imposing two \$200 fines on the Licensee and making her license conditional. In the Order to Forfeit a Fine portion, the Department assessed one \$200 fine for violation of Minn. Stat. § 245A.50, subd. 6. This violation was described as, "On February 23 and 24, 2009, Crow Wing County Social Services determined that you and a 2nd caregiver transported children under nine

⁴³ Exhibit 7 at 1, Exhibit 9. The only report from the Case Aide in evidence is for March 11 and says he arrived "at 3:00 pm." Anderson later reported the time on the three dates was "approximately 3:10 p.m."

⁴⁴ Exhibit 7 at 1-2, Exhibit 8.

⁴⁵ Testimony of the Licensee, Judy Monasmith and Thomas Monasmith.

⁴⁶ Exhibit 4.

⁴⁷ Exhibit 12 at 2-3.

years of age from school on more than one occasion when you had not completed the required Child Passenger Restraint Training.” The other \$200 fine was assessed for violation of Minn. Stat. § 245A.50, subd. 5. This violation was described as, “On February 23, 2009, Crow Wing County Social Services determined that you allowed a substitute provider to provide care to infants prior to receiving training on reducing the risk of sudden infant death syndrome and shaken baby syndrome.”⁴⁸

46. The Order of Conditional License portion cited Minn. Stat. § 245A.06, subds. 1(a) and 6, which authorize the Commissioner of Human Services to issue a correction order or order of conditional under specified conditions and specify the factors that must be considered before imposing any license discipline, including a conditional license. The Order of Conditional License cited four provisions of Minn. Stat. § 245A.50 (family child care training requirements) as having been violated: Minn. Stat. § 245A.50, subd. 3 (first aid training); subd. 4 (CPR training); subd. 5 (SIDS and SBS training); and subd. 6 (child passenger restraint systems training).⁴⁹ In addition, the Order of Conditional License cited Minn. Rule 9502.0325, subp. 1 (purpose of day care rules) and Minn. Rule 9502.0315, subps. 6, 26, and 29 (definitions of “caregiver,” “regularly or regular basis,” and “substitute”).

47. Minn. Rule 9502.0325, subp. 1, provides:

Subpart 1. **Purpose.** The purpose of parts 9502.0315 to 9502.0445 is to establish procedures and standards for licensing family day care and group family day care homes to ensure that minimum levels of care and service are given and the protection, proper care, health, safety, and development of the children are assured.

48. In addition to the training violation allegations, the Order of Conditional License cited the March 5, 2009, Correction Order as a basis for issuing a Conditional License and concluded:

Due to the serious and chronic nature of the above violations including transporting children prior to completing the required child passenger restraint training, allowing a substitute to provide care to infants prior to receiving SIDS/SBS training, failing to ensure that a substitute that provided more than 30 hours of care in a 12-month period had completed first aid and CPR training, and in order to protect the health, safety, and rights of children receiving services in DHS-licensed programs, your license to provide family child care is placed on conditional status for a period of one year.⁵⁰

49. The Order of Conditional License allowed the Licensee to continue to operate with under the conditional license with the following stipulations:

⁴⁸ Exhibit 1.

⁴⁹ Exhibit 1.

⁵⁰ Exhibit 1.

1. You follow and comply with all applicable Minnesota Rules and Laws.
2. No variances to age distribution or capacity will be granted during the conditional period.
3. You submit a written plan to Crow Wing County Social Services by **October 9, 2009**, regarding your plan for transportation of children in care. The plan must state that children will not be transported by you or any other caregiver until required child passenger training has been completed. The plan must address when you and any other adult caregivers will receive the required training, how you will transport children in care, and must list all the destinations where you may plan to transport children. Your plan must include a sample of the parental permission for transportation and include documentation that all parents have signed the permission form. The plan must be approved by Crow Wing County Social Services.
4. You submit a written plan to Crow Wing County Social Services by **October 9, 2009**, regarding your plan ensuring all caregivers in your family child care program complete required SIDS/SBS, first aid, and CPR training. The plan must state that caregivers without the SIDS/SBS training will not be assisting with or providing care to infants until this training is completed. The plan must list any other caregivers in your program and must list when they have completed or when they will complete the required training. The plan must list any caregivers that provide care for more than 30 days in a 12 month period and documentation of training they have [completed]. The plan must be approved by Clay County Social Services.
5. You must either provide a copy of the Order of Conditional License to parents of children in care or document that all parents have been given an opportunity to review the Order of Conditional License. You must obtain parent signatures for each currently enrolled child, verifying they have either received a copy of the conditional order or had an opportunity to review the conditional order. You must provide this documentation to Crow Wing County Social Services **by October 9, 2009**. For new families, you must submit documentation of compliance with this term to Clay County Social Services **within 5 days of any child's admission** to your child care program.

The Order also required that Licensee post a copy of the Order in a conspicuous place for two years as required by Minn. Stat. §§ 245A.07, subd. 5 (must post an order of fine), and 245A.06, subd. 8 (must post an order of conditional license).⁵¹

⁵¹ Exhibit 1 (emphasis in original).

50. On September 30, 2009, the Licensee mailed an appeal of the Order to Forfeit Fine and Order of Conditional License to the Department.⁵²

51. On October 13, 2009, the County's Child Care Licensur mailed a copy of the Notice of and Order for Hearing to the Administrative Law Judge setting this matter for hearing on December 3, 2009. No copy was sent to the Licensee at that time. On October 19, 2009, the Administrative Law Judge issued and served a standard Protective Order upon the parties.

52. On November 4, 2009, the Assistant County Attorney mailed the Notice of and Order for Hearing, along with other supporting information, to the Licensee and the Administrative Law Judge. The documents were received by the Administrative Law Judge on Monday, November 9, 2009.

53. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

54. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

55. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction to consider this matter.⁵³

2. The Department gave proper and timely notice of the hearing and has complied with all procedural requirements of law and rule.

3. The Commissioner may impose a fine of \$200 on a license holder for each occurrence of a violation of law or rule governing matters of health, safety, or supervision, \$1,000 for each determination of maltreatment, and \$100 for each occurrence of a violation that is not subject to a \$200 or \$1,000 fine.⁵⁴

4. When the Commissioner has ordered a license holder to pay a fine, the license holder may, upon timely proper notice, appeal the fine by requesting a contested case proceeding. The Licensee in this matter made a timely and proper request for a contested case proceeding to appeal the fine imposed by the Commissioner.

⁵² Exhibit 3.

⁵³ Minn. Stat. §§ 245A.07, subds. 1 and 3; 14.50.

⁵⁴ Minn. Stat. § 245A.07, subd. 3.

5. If the Commissioner finds that the applicant or license holder has failed to comply with an applicable law or rule and this failure does not imminently endanger the health, safety, or rights of the persons served by the program, the Commissioner may also issue an order of conditional license to a licensee. When issuing a conditional license, the Commissioner must consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.⁵⁵ When the Commissioner issues a dual order of both a fine and a conditional license, the scope of an ensuing contested case hearing includes both the fine and the conditional license.⁵⁶

6. The Order to Forfeit a Fine alleged that the Licensee and a second caregiver transported children under nine years of age from school on more than one occasion when the Licensee had not completed the required Child Passenger Restraint Training. The Licensee was aware of this training requirement and intentionally chose to transport day care children before she and her mother obtained the training. Further, she did not act quickly to correct the violation or to seek her licenser's assistance. This constitutes a violation of Minn. Stat. § 245C.50, subd. 6, as alleged. The assessed fine of \$200 for this violation should be affirmed.

7. The Order to Forfeit a Fine alleged that the Licensee allowed a substitute provider to provide care to infants prior to receiving training on reducing the risk of sudden infant death syndrome and shaken baby syndrome in violation of Minn. Stat. § 245A.50, subd. 5. The Licensee has demonstrated by a preponderance of the evidence that the substitute provider, her mother, did not provide care to infants. There is no violation of Minn. Stat. § 245A.50, subd. 5. The fine assessed for this alleged violation should be reversed.

8. The Order of Conditional License alleged that the Licensee had allowed her mother to provide care to infants and older children for more than thirty [hours] during a 12 month period in violation of four family child care training requirements: Minn. Stat. § 245A.50, subd. 3 (first aid training); subd. 4 (CPR training); subd. 5 (SIDS and SBS training); and subd. 6 (child passenger restraint systems training). The Licensee has demonstrated by a preponderance of the evidence that her mother did not provide care to day care children for 30 hours or more during any 12-month period and did not provide care to infants. There is no violation of Minn. Stat. § 245A.50, subs. 3, 4, or 5. There was a violation of Minn. Stat. § 245A.50, subd. 6, for transporting children prior to safety restraint training.

9. A conditional license is not justified in this case. The Licensee promptly complied with every direction and correction order that she was given. Her violation of the restraint training requirement was serious, but she eventually raised the issue herself and then immediately complied with the Licenser's directions. She does not need a plan to correct things that she has already corrected or stands ready to correct. All the evidence demonstrates that she operates a very good day care.

⁵⁵ Minn. Stat. § 245A.06, subd. 1.

⁵⁶ Minn. Stat. § 245A.06, subd. 4.

10. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

11. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon the foregoing Conclusions, and for the reasons set forth in the attached memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Department's Order to Forfeit a Fine be **MODIFIED** to specify a fine of \$200 and that its Order of Conditional License be **REVERSED**.

Dated: February 10, 2010

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Digitally Recorded, No Transcript Prepared.

NOTICES

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of Cal Ludeman, Commissioner, Department of Human Services, PO Box 64998, St. Paul, MN 55164-0998, 651-296-2701, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the negative licensing action, if any, to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve his final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

This case depends largely upon the credibility of the Licensee and the Licensors. The Administrative Law Judge finds that the Licensee was more credible. The Licensee was assertive and sure of herself, and her testimony was more consistent with what would normally be expected. She was very protective of the safety of her own children and of her day care children. She tried to comply with the day care requirements, even though she struggled with some of them. She should have tried to work with her Licensors more closely and more openly.

The Lensors was not as credible. Her testimony consisted of conclusions without much factual support. She had a great deal of frustration with the Licensee. She told the Department and testified at the hearing that the Licensee refused to comply with the statute and would continue to transport her children even without the training. It is far more likely that the Licensee said that her children had to have rides and it was too dangerous for them to walk. The Lensors should have proposed some real solutions and should have tried to work with the Licensee more closely and more openly.

S.M.M.